BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-263-E

Cherokee County Cogeneration Partners, LLC	)	
	)	
Complainant,	)	
	)	
v.	)	**RESPONSE TO PETITION FOR RECONSIDERATION**
	)	
Duke Energy Progress, LLC and Duke Energy Carolinas, LLC,	)	
	)	
Respondents.	)	

Cherokee County Cogeneration Partners, LLC ("Cherokee"), pursuant to S.C. Code Ann. 58-27-2150, S.C. Code Ann. Regs. 103-825, and S.C. Code Ann. Regs. 103-854, provides its response to the Petition for Rehearing or Reconsideration filed by Respondents Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (the "Duke Petition").

As set out herein, the Commission should deny the Duke Petition.

I. Background

The Duke Petition requests that the Commission reconsider its finding that "Cherokee established a legally enforceable obligation (LEO) with Duke Energy Carolinas on September 17, 2018, to sell its power at Duke Energy Carolinas' avoided cost rate approved and determined by the Commission which existed on the date of the obligation." (Order, Finding of Fact No. 1).

In addition, the Duke Petition requests that the Commission "[c]larify that, regardless of the LEO date, DEC should use an avoided cost methodology that is consistent with the methodology determined and approved by the Commission in Order No. 2019-881(A) to calculate just and reasonable avoided cost rates to be paid to Cherokee." (Duke Petition, p. 1).

II. Arguments

The Duke Petition Presents No Valid Basis to Reconsider the Commission's "LEO" Finding

The Duke Petition argues that the Order failed to consider evidence and legal authority in support of the proposition that Cherokee did not establish a LEO on September 17, 2018. (Duke Petition, pp. 3-8).

In particular, the Duke Petition argues that "Cherokee could and, in fact, did walk away from its September offer to DEC." (Duke Petition, p. 4). On the contrary, the record contains overwhelming evidence that Cherokee never walked away from its September 17, 2018 "legally binding offer of all capacity and energy associated with the Facility as of January 1, 2021 . . . . " (Order, p. 33-34). Among other things, Cherokee filed a complaint and went through a hearing in order to follow through on its offer.

Duke further argues that the Order "fails to address Commission precedent that no LEO is created when a QF is "free to walk away from the negotiations[.] (Duke Petition, p. 5), and references Commission Order No. 2001-663 (*Pacolet River Power Co., Inc. v. Duke Power Co.*, Order on Remand Dismissing and Denying Complaint, Docket No. 95-1202-E) ("*Pacolet Order*"). First, as a general proposition, the Commission is not bound by "precedent," particularly with respect to factual matters. *330 Concord Street Neighborhood Ass'n. v. Campsen*, 309 S.C. 514, 517, 424 S.E.2d 538, 540, (1992) ("*Campsen*") ("An administrative agency is generally not bound by the principle of *stare decisis* but it cannot act arbitrarily in failing to follow established precedent."). In other words, and consistent with the South Carolina Administrative Procedures Act, the Commission must decide each contested case based on its own facts.

Accordingly, and as recognized in *Campsen* and by the Commission in numerous Dockets, the Commission does not act arbitrarily with respect to a prior decision when there are

"distinguishing factors" between cases. The "distinguishing factors" between the circumstances in this Docket and those in the *Pacolet Order* are numerous and significant. As just one example, the existing PPA between Pacolet River Power Company and Duke Power Company "specified an initial term of one year, continuing thereafter until terminated upon 30 months' notice by either party." *Pacolet Order*, p. 6. Accordingly, the parties were in an existing contract that had not been terminated by either party. Accordingly, the full quote from the *Pacolet Order* concluding that Pacolet River Power Company could not establish a LEO shows exactly why those facts (and the Commission's rationale) do not apply here:

> Because Pacolet was a party to a valid, existing contract, which was not terminated by either party, and because Pacolet was free to walk away from the negotiations without liability, no "legally enforceable obligation was created."

(*Pacolet Order*, p. 12). Here, by contrast, no party disagrees that the 2012 PPA terminated on December 31, 2020, and that Cherokee was seeking to secure a successor PPA *effective January 1, 2021*. As the record amply demonstrates, Cherokee could not and did not walk away from its negotiations for a successor PPA. The *Pacolet Order* neither mandates a different result, nor affects the proper analysis of the LEO undertaken in the Order. Even if the *Pacolet Order* were applicable—it is not—this single 20-year-old case was issued well before the FERC's clarification of the LEO requirements; that is, that a QF can bind the utility to a LEO by offering its power. *JD Wind 1, LLC*, 129 FERC ¶ 61,148, 61,633 (2009).

The Duke Petition also argues that the "Order fails to address whether a LEO is open-ended or limited to a reasonable period of time to execute a power purchase agreement ('PPA')." (Duke Petition, p. 5). The Commission need not address or answer that question other than with respect to these facts and circumstances. The Order's finding that Cherokee established a LEO on September 17, 2018 is supported by substantial record evidence regarding the character of the

negotiations that took place between the parties. For example, the Commission ruled "[w]e do not find DEC's response to Cherokee's letter of September 17, 2018, denying Cherokee established a legally enforceable obligation was appropriate." (Order, p. 32). Moreover, the Commission questioned "DEC's offer of a "must take" agreement, in light of the history between the companies and the nature of the dispatchable power Cherokee had been providing under the 2012 PPA." (Order p. 32). Accordingly, in this case, Cherokee's LEO is valid based on PURPA and the course of dealing between the parties.

Contrary to Duke's Petition, the Commission Should Require DEC to Calculate Avoided Cost Rates for Cherokee Based on the Testimony of Witness Strunk

Duke argues that "DEC should calculate avoided cost rates for Cherokee consistent with the avoided cost methodology approved by the Commission in Order No. 2019-881(A)." (Duke Petition, p. 8). However, and as set out in Cherokee's Petition for Rehearing or Reconsideration, the substantial testimony and related calculations submitted by Cherokee through its testimony and evidence in this proceeding support a finding that, "the avoided cost rate for this facility shall be the $110 per kW amount, though if start up costs are reimbursed separately, as they are in the 2012 Agreement, the rate would be $90 per kW-year." *See* Cherokee Proposed Order, page 32 and related record testimony and calculations therein at pp. 29-33.

The Duke Petition argues that "[n]o Commission-approved avoided cost calculation methodology existed in September 2018." (Duke Petition, p. 8). However, the methodology employed by Cherokee Witness Strunk to calculate energy and capacity components were based on DEC's own energy proposal to Cherokee, and the capacity value approved by Commission Order 2016-349.

Cherokee's avoided cost calculations (not just the bare energy and capacity components but how Mr. Strunk calculated same) were included in Mr. Strunk's prefiled testimony, and were

subject to cross-examination from the parties and questions from the Commissioners at the hearing. DEC's submission to the Commission, by contrast, was made via late-filed exhibit after the hearing and consists solely of the two numbers representing those energy and capacity rates. Second, Cherokee's s calculated avoided cost rate, including the avoided capacity rate proposed by Cherokee witness Mr. Strunk, comports with this Commission's Order No. 2016-349: the avoided cost order approved by this Commission at the time the LEO was created.

Third, the avoided energy rate calculated as of the date of the LEO by Mr. Strunk was virtually the same as the avoided energy rates provided by DEC in its October 31, 2018 avoided energy rate schedules. It was only after the hearing that DEC attempted to introduce a much lower energy rate ($9 per kW-year lower than Duke's own October 2018 calculations), that is completely unsupported by any filed Duke testimony. Fourth, such avoided cost rate would represent a rate that is 24% lower than the avoided cost rate calculated by Cherokee using the September 2018 avoided cost energy prices, fuel prices and Cherokee dispatch parameters provided by DEC.

The Duke Petition argues that "[t]he Order fails to resolve the Parties' dispute regarding Cherokee's right, or lack thereof, to a capacity payment regardless of utility need." Accordingly, Cherokee urges the Commission to adopt Cherokee's position on this issue based on the substantial evidence that Cherokee is entitled to capacity payments. Mr. Strunk testified that Cherokee's avoided capacity payment methodology corrects this Duke misconception that Cherokee's capacity rate should have been zero at the time of DEC's October 31, 2018 offer letter. Strunk Direct Testimony, pp. 19-20; Tr. Vol. 1, pp. 126.21-22. Specifically, Mr. Strunk stated that he included compensation for avoided capacity costs, as the existing rates being offered to QFs at that time incorporated compensation for capacity, and Cherokee had been providing reliable capacity

to the DEC system for decades. Strunk Testimony, pp. 4-5; Tr. Vol. 1, pp. 126.6-7. Witness Strunk states that he sourced the capacity value from DEC's Schedule PP tariff to assure non-discrimination. Strunk Direct Testimony, p. 16; Tr. Vol. 1, p. 126.16.

When Cherokee established a LEO in September of 2018, the Schedule PP tariff was the only capacity rate for QFs that was approved by the Commission (via Order 2016-349). Because the per unit value of avoided capacity costs does not change with respect to the size of the QF, Witness Strunk testified that it was appropriate to carry over that avoided capacity cost rate from the small QF tariff to the large QF rate available to Cherokee. Tr. Vol. 3, p. 602, 606-607. Mr. Strunk took dollar per MWh rates in this tariff and applied them to a projection of Cherokee's 2021 MWh output to arrive at the capacity revenues for Cherokee. This approach resulted in a capacity rate that appropriately implements PURPA since it: (1) relies on the most recent commission order at the time Cherokee established its LEO, and (2) provides compensation for Cherokee's reliable capacity that can supplant DEC investment, as intended by PURPA.

As Mr. Strunk also testified, Order 2016-349, controlling authority in October 2018 when DEC provided its rate schedule, included rates that were based on full capacity compensation payments for QFs, and were not discounted to reflect years without a purported capacity need. Tr. Vol. 1, p. 172. Only after Cherokee's LEO, and after the passage of the Energy Freedom Act, did IRPs formally require Commission approval, and only in the 2019 avoided cost docket did the Commission confirm the nexus between the IRP and the avoided cost calculations.

Accordingly, substantial evidence supports the inclusion of capacity payments.

Duke argues that "[t]he Order fails to determine that the avoided cost rates proposed by Cherokee would exceed DEC's avoided cost and not be just and reasonable to customers." (Duke Petition, pp. 11-12). Duke's sole authority for this statement is a graph presented by Mr. Snider

and based on calculations by the North Carolina Public Staff in another Docket. That graph shows lower rates than DEC itself has calculated at various times during its negotiations with Cherokee and during this proceeding, is not properly labelled to indicate what costs are included in the "total", and appears to ignore any value for capacity and or a dispatchable PPA. Tr. Vol. 3, pp. 630-633. Therefore, this graph is not reliable evidence, particularly when compared to the testimony of Mr. Strunk. And of course the Order did not rely on this graph, but included same when summarizing the evidence submitted by the parties.

In sum, Cherokee's avoided cost calculations are supported by substantial evidence in the record of this case, and the Duke Petition's arguments that those avoided cost calculations 1) are higher than DEC's avoided costs; 2) will result in overcharging customers; and 3) would treat the Facility more favorably than any other QF (Duke Petition, p. 13) are not supported by any reliable evidence whatsoever.

Accordingly, Cherokee requests that the Commission deny reconsideration as sought by Duke, grant the limited reconsideration sought by Cherokee, and grant such other relief as is just and proper.

Respectfully submitted,

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